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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

WINSTAR CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents in these cases argue that Congress breached contracts with them when, in enacting FIRREA in 1989, it strictly limited the amount of intangible assets that federally insured savings and loan associations could use to satisfy federal capital requirements. In respondents' view, federal bank regulators had made binding contractual promises to them that Congress would not take such regulatory action or that, if it did, it would exempt respondents from the application of the new regulations.

It would be quite unusual, to say the least, for federal regulatory officials to purport to make binding promises

to those whom they regulate that Congress would not take future regulatory action that might be necessary to protect the public interest. As we show in our opening brief, no such promises were made here. When promises were made, they provided only that, to the extent that "goodwill" or "capital credits" could legally be treated as assets by thrifts, respondents could account for those intangibles on their books in certain ways. Such promises about the accounting treatment to be accorded assets were within the competence of bank regulators to make and were not breached in these cases.

Reading the documents upon which respondents rely to refer to the accounting treatment to be accorded goodwill and capital credits, rather than to the right to treat these intangibles as assets regardless of Congress's attempts to exercise its regulatory power to protect the solvency of the nation's banking systems, is, we submit, the most natural interpretation of the relevant language. If there are any ambiguities in the language, however, this Court has made clear that such ambiguities must be resolved in favor of Congress's ability to exercise its powers free of the threat of damage claims for breach of contract. Any alleged contractual limitation on Congress's exercise of its sovereign powers thus must be unmistakably clear. The court of appeals' failure to apply that principle in these cases led it to misconstrue the documents upon which respondents rely, and incorrectly to impose breach-of-contract liability on the United States for Congress's decision to adopt stricter capital requirements in an effort to restore solvency to the nation's thrift industry.

1. Respondents repeat their claims that the thrift regulators promised that the government would count respondents' supervisory goodwill (and, in Statesman's case, capital credits) as capital for purposes of satisfying federal capital requirements for periods of 25 to 40 years. Repetition of those claims does not substitute for their failure to obtain such promises in the terms of the contracts at issue.

a. *Glendale.* Glendale concedes (Br. 21) that the "critical terms" on which it relies were not included within the four corners of the contract between the parties—the Supervisory Action Agreement (SAA). Instead, Glendale claims (*ibid.*) that they were "contained in documents [primarily, Bank Board Resolution 81-710 (J.A. 605-610)] that were included in the contract through the integration clause of the SAA."[1]

As the language of the integration clause of the SAA makes clear, however, the SAA, "together with an interpretation thereof or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties thereto." J.A. 598-599. That sentence precludes construing the Bank Board Resolution as a statement of the parties' contractual undertakings. The Bank Board was, in the first place, not a "party" to the SAA. See J.A. 587. Nor did the SAA parties (FSLIC and Glendale) ever "agree * * * in writing" to the Board's Resolution, which in all events was a statement of regulatory policy, not a contractual "understanding."[2] Ac-

[1] Glendale does not claim that the Bank Board Resolution itself or the terms contained in it would have constituted contractual commitments of the government, absent the integration clause in the SAA. Such documents were the record of the Bank Board's regulatory actions, which the Board remained free to change, in accordance with applicable legal standards governing agency action. See, *e.g.*, *Charter Fed. Sav. Bank* v. *OTS*, 976 F.2d 203, 211 (4th Cir. 1992), cert. denied, 507 U.S. 1004 (1993); see also *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598, 621 (D.C. Cir. 1992); cf. *Peterson* v. *United States Dep't of the Interior*, 899 F.2d 799, 811 n.17, 813 n.18 (9th Cir.), cert. denied, 498 U.S. 1003 (1990).

[2] The Bank Board Resolution (J.A. 605-610) carries all of the conventional earmarks of an agency regulatory determination, not a contract. It begins with the factual premises for the agency's action (the "whereas" clauses, J.A. 605-606), and continues with

cordingly, nothing in the integration clause could possibly have converted the Bank Board's statements into contractual undertakings of the government.

Under the integration clause, the Bank Board Resolution did become part of the Glendale contract for the purpose of determining what occurs in the event of a conflict between the SAA and the Bank Board Resolution: in that situation, nothing in the SAA "supersede[s]" the Bank Board Resolution. J.A. 599. That reference did not, however, convert the Resolution's statements of regulatory policy into contractual commitments.[3] Cf. *Guerini Stone Co.* v. *P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916) ("[A] reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement *only for the purpose specified*.") (emphasis added) (citing cases).

Most of Glendale's remaining arguments (Glendale Br. 22-26) regarding the meaning of the provisions in the Bank Board Resolutions and other documents are addressed in our opening brief (at 25-26, 28). The Peat, Marwick letter submitted by Glendale (see Glendale Br. 22) after the transaction could not possibly constitute an additional contractual commitment by the government. As the Bank Board Resolution required, that letter was submitted so that the Board could determine "the reasonableness of amounts attributed to goodwill * * * and

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the resolution clauses themselves, J.A. 606 ("Now therefore, it is resolved * * *"), J.A. 607-610 ("Resolved further, * * *"), which granted the necessary regulatory approval to Glendale's transaction.

[3] The Winstar integration clause, see J.A. 112, is virtually identical to the integration clause in *Glendale*. The Statesman integration clause, on the other hand, provides that "[t]his Agreement, together with any resolutions adopted by the Bank Board and documents delivered at closing * * *, constitutes the entire agreement between the parties." J.A. 407-408. This provision is discussed in our opening brief, at 32-36. Statesman's claim regarding capital credits must be rejected in light of the unmistakability doctrine.

the resulting amortization periods" for purposes of applying its then-current policy. J.A. 607. Had the letter been insufficient for those purposes, the Bank Board could have rescinded its approval of the transaction. The letter, generated by Glendale's accountants, obviously did not and could not include any new contractual commitment by the government not already made in the SAA, and the approval of the letter by the Bank Board's agent could not be construed to have made any such new commitment.

b. *Winstar* and *Statesman*. Like Glendale, Winstar and Statesman also argue that their contracts included commitments by the government regarding the future treatment of supervisory goodwill.[4] We addressed those claims, as well as Statesman's claims regarding capital credits, in our opening brief. See U.S. Br. 28-36.[5]

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[4] As noted in our opening brief, Winstar's Assistance Agreement expired in 1986, and any government obligations in that agreement therefore expired long before FIRREA was enacted. Winstar argues (Br. 30 n.19) that the expiration clause of its agreement is prefaced by the phrase "[e]xcept as otherwise specifically provided in this Agreement." J.A. 110. There is, however, no reference to supervisory goodwill anywhere within the four corners of Winstar's Assistance Agreement, and any commitments made in the Bank Board Resolutions and other regulatory documents would not appear to be commitments "*in* this Agreement." Nor do those other documents "specifically provide" for any extended expiration date. Statesman claims (Br. 26) that its Regulatory Capital Maintenance Agreement (RCMA) (J.A. 419) contains a contractual commitment regarding its capital credits and supervisory goodwill. Any such commitment, however, was only "[f]or purposes of this Agreement." J.A. 419. The RCMA was never violated, and any such commitment is accordingly of no significance.

[5] Respondents also rely on statements in Bank Board documents and made by Bank Board officials in the course of negotiations. See, *e.g.*, *Winstar* Br. 27 n.15, 30 n.18. At most, those statements demonstrate that the Bank Board anticipated that supervisory goodwill would be booked in connection with the transaction and that that was consistent with then-current Bank Board policy.

Winstar and Statesman both rely on the Accounting Principles clause in their Assistance Agreements. Winstar Br. 22-24, 28-29. For the reasons given in our opening brief (at 30-31), those provisions (J.A. 108-109, 458-459), which apply to "any computations made for purposes of this Agreement," in fact support our argument. Winstar complains (Br. 29), however, that we have not "explain[ed] what 'computations made for the purposes of this Agreement' the clause could possibly be referring to if not regulatory capital computations." The clause refers to computations that had to be made for purposes of provisions of Winstar's Assistance Agreement that, for example, required FSLIC to make a cash contribution to Winstar based on its "aggregate negative Net Worth" (J.A. 97), that required FSLIC to indemnify Winstar for undisclosed liabilities and claims (J.A. 100-101), and that limited FSLIC's potential indemnity contributions with regard to subsidiary corporations to an amount determined by "[Winstar's] investment in [those] subsidiary corporation[s]" (J.A. 102-103). See also, *e.g.*, J.A. 362-368, 368-373, 373-374, 380 (comparable Statesman provisions).

2. In short, the government never made the promises regarding supervisory goodwill that respondents claim. Such promises could have been stated in simple language. For example, the parties could have provided that, "regardless of any changes that may be made in applicable federal statutes or regulations, [the thrift] may count supervisory goodwill created in this transaction as capital for purposes of satisfying federal capital requirements for the next [25, 35, or 40] years." Or they could have provided that, "for the purposes of satisfying federal capital requirements, the supervisory goodwill created in this transaction shall be credited to the [thrift's] regulatory capital account and shall constitute regulatory capital, such capital to be recognized until amortized over [25, 35, or 40] years." See J.A. 362a; see U.S. Br. 34. That is not what the contracts in this case provided. Respondents' after-the-fact effort to revise their contracts to add promises that were never made should be rejected.

Respondents argue that their contracts should be construed to contain the promise that they would continue to have the right to keep supervisory goodwill on their books, despite any statutory changes limiting the use of intangible assets, because the transactions as embodied in the documents would otherwise be "financially nonsensical in light of the value of the consideration that [FSLIC] received from [respondents]." Glendale Br. 30;[6] see also Winstar Br. 19. As we explain in our

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[6] Glendale suggests (Br. 32-34) that we conceded that the parties intended to make the contractual promise that goodwill could continue to be treated as an asset despite statutory changes. Glendale bases that alleged concession on what it claims was our failure to contest its Proposed Findings of Uncontroverted Fact in the Court of Federal Claims under Court of Federal Claims Rule 56(d)(1). App., *infra*, 4a. That Rule was inapplicable in this case, however, and neither court below relied on it or otherwise suggested that we had made the alleged concession. Discovery in this case was stayed from an early date until at least the time the Court of Federal Claims issued its decision on reconsideration in *Winstar* (Pet. App. 153a-180a) on April 21, 1992. On that date and on May 6, 1992, the trial court requested further briefing from the parties regarding the effect of its *Winstar* rulings on Glendale's case, but the trial court did not reopen discovery. Accordingly, we filed an affidavit (*reprinted at* App., *infra*, 1a-2a) pursuant to Court of Federal Claims Rule 56(g). See App., *infra*, 6a. That affidavit rendered Rule 56(d)(1) inapplicable. The affidavit stated that, insofar as the trial court was inclined not to grant our motion to dismiss and to grant summary judgment to Glendale, such "a ruling * * * would be premature, as [the government] has not had an opportunity to obtain discovery as to certain issues raised in plaintiff's motion for summary judgment." App., *infra*, 2a. Our position was that, although we did not dispute that the key documents (the SAA, the Bank Board Resolutions, and the Peat, Marwick letter) were each what they purported to be, any ruling that relied on other materials or affidavits to discern the intent of the parties would be premature, because we had not had sufficient

opening brief (at 27 & nn.19-20), that is incorrect.[7] At the time of Glendale's transaction, no change in federal policy permitting thrifts to count supervisory goodwill as capital was imminent, and such a change was not in fact made until eight years later.[8] Although, as respondents state, such a change immediately after an acquisition could subject a thrift to immediate danger of closure, it would also impose the costs of such closure on the Insurance Fund—precisely the outcome that all parties agree the Bank Board was trying to avoid. See Glendale Br. 3-4; Winstar Br. 3-5. Indeed, it was only Congress's unprecedented decision to invest well over $100

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opportunity for discovery on those issues. The trial court appeared to accept our position, relying in the portions of its summary judgment ruling regarding Glendale (Pet. App. 114a-120a, 122a-125a) on no materials aside from the key contractual documents. Glendale cannot rely on a mistaken interpretation of a Court of Federal Claims Rule that neither that court nor the Federal Circuit has accepted.

[7] Respondents assert that the government claims "that it is even entitled under the law to keep the multi-million dollar investments that it solicited from Statesman and Winstar and then seized along with the thrifts." Winstar Br. 13. In fact, respondents' investments were not funds given to the government, but funds invested in the thrifts; when Statesman and Winstar were ultimately closed, the Insurance Fund had to make up a very substantial shortfall. In a similar vein, respondents allege that our claim is "that [the government] made no promises and assumed no risks in connection with [the] transactions." Winstar Br. 20. The contracts with Winstar and Statesman, however, include numerous examples of government promises—such as the indemnification provisions, see p. 6, *supra*—all of which were performed. Moreover, because the government remained responsible after the transaction, as before, for the insured deposits under the control of respondents at each of the thrifts involved, the government itself assumed significant risks in permitting the transactions to go forward.

[8] Federally insured thrifts always operate against a background risk that the laws (or regulations) regarding financial soundness (or other regulatory matters) will be altered in a way that would threaten them with closure. See U.S. Br. 27 n.19.

billion to bail out the Insurance Fund that led to FIRREA's 1989 alteration of federal policy.[9]

Prior to that time, respondents obtained very substantial benefits as the result of the transactions in this case. Indeed, it was the profit-making potential of those transactions that led respondents to engage in them. For example, Glendale obtained the right to do business in Florida, a lucrative new market where, at the time it filed this action, it had the "largest branch network of any thrift." J.A. 561.[10] It also acquired the assets of a large thrift institution and the substantial profit potential that those assets represented. In addition, Glendale obtained the going-concern value of the acquired thrift, a provision protecting it against rising interest rates, indemnification against unknown liabilities of the acquired thrift, and a variety of short-term cash advances. See U.S. Br. 43.[11]

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[9] Congress made more than $105 billion available to the Resolution Trust Corporation, in four separate statutes. See GAO, *Financial Audit: Resolution Trust Corporation's 1994 and 1993 Financial Statements* 7 (1995). According to the most recent figures, only approximately $90.2 billion, however, was expected to be spent. See *ibid.* In addition to the RTC funds, the FLSIC Resolution Fund has an accumulated deficit of $43.7 billion. See FDIC, *1994 Annual Report* 95 (1995).

[10] In the Statesman and Winstar cases, the acquirers were new to the thrift industry. They obtained extremely valuable franchises to participate in the industry—franchises that were believed at the time to offer the key to high profits on a variety of types of loans, with most of the risk being borne by the deposit insurance fund. See National Commission on Financial Institutions Reform, Recovery and Enforcement, *Origins and Causes of the S&L Debacle: A Blueprint for Reform, A Report to the President and Congress of the United States* 45-47 (1993) [hereinafter *Blueprint*]. See Pub. L. No. 101-647, Tit. XXV, §§ 2551-2552, 2556, 104 Stat. 4889, 4892 (statute requiring appointment and setting mission for commission).

[11] The interest rate protection provision provided for payments from the government to Glendale if interest rates went up, and

Indeed, Glendale's own assets increased from about $5 billion at the time of the merger in 1981, see J.A. 550, to more than $25 billion at the time it filed suit in 1990, see J.A. 546. That increase alone suggests that Glendale's participation in the transaction was a reasonable choice.[12]

In addition, as commentators have explained, even if an acquiring thrift like Glendale showed a positive net worth on its books, such thrifts "were frequently insolvent * * * on a market value basis." William Black, *Ending Our Forebearers' Forbearances: FIRREA and Supervisory Goodwill*, 2 Stan. L. & Pol'y Rev. 102, 104 (1990).[13] In that situation, because the acquiring thrift's owners face no risk of further loss to themselves, the acquiring thrift

> has every incentive to take extreme risks, which promise the possibility of very high yields. If the gamble pays off, the owners of the S&L or bank capture all the profit; if the gamble fails, the FSLIC or the FDIC pays for the loss.

Ibid. Indeed, the general tendency of businesses with little of their own capital at stake to take risks is well-documented,[14] and such high risk-taking was endemic in the thrift industry during the 1980s.

Finally, there were further incentives for those in all of respondents' positions to acquire thrifts. Of perhaps greatest importance was the way in which such transactions could increase the apparent income of the thrift. As the commission charged by statute with investigating the causes of the thrift debacle explained, thrifts involved in mergers or acquisitions were able to amortize the "goodwill" created by the acquisition slowly while taking accelerated paper profits based on the presumptive increase in the face value of mortgages as they approached the end of their expected lives.[15] That enabled thrift

payments from Glendale to the government if they went down. See J.A. 591-593. Glendale notes (Br. 9) that, because interest rates went down, this provision in fact resulted in a payment of $18.24 million from Glendale to the government. The provision nonetheless was inherently beneficial for Glendale. Although the government was to have begun its payments from the first dollar, the provision expressly excused Glendale from having to pay the first $20 million it would owe under this provision. J.A. 593.

[12] Similarly, Statesman's net worth increased more than $6 million between its March, 1988, transaction and July 5, 1990. Winstar Br. 6-7. (Due to a typographical error, our opening brief erroneously states in one place that the Statesman transaction took place in 1987. U.S. Br. 32. In fact, it took place in 1988, as our brief elsewhere correctly states. See U.S. Br. 6.)

[13] Although Glendale's books indicated that it was solvent at the time of the transaction, the market value of its assets at the time of the transaction is a factual issue that has not been resolved in this case. During the 1980s, increasing numbers of thrifts that had appeared solvent turned out to have little or no capital when their assets were marked to market. See *Blueprint* 43-44, 52-54. Cf. J.A. 553-554 (¶ 32) (marking thrift assets to market produces dramatic decline in net worth).

[14] See, *e.g.*, Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 205 (1986) ("When a firm is insolvent and has $100,000 in debts and only $80,000 in assets, it is unlikely that it would be in the interests of the creditors to have that $80,000 placed on number 20 at a roulette wheel in Atlantic City, but it clearly would be in the interests of the shareholders to do so."); Susan Rose-Ackerman, *Risk Taking and Ruin: Bankruptcy and Investment Choice*, 20 J. Legal Stud. 277, 296 (1991).

[15] The Commission explained:

> [The Bank Board] allowed and encouraged "goodwill mergers," in which the assets of an acquired S&L were marked down to market, and the difference between its liabilities and the market value of its assets * * * was designated as "goodwill[.]" * * * [O]nce the goodwill was recognized, GAAP allowed the "discount" of the market value of acquired assets from their book value to be "accreted" as income over the remaining expected life of the assets under the assumption that the assets' value would rise steadily to their book value. Because the "goodwill" fabricated from the acquisition was written off more slowly than acquired assets matured, the book income from "accretion of discount" exceeded the expense of

managers and owners to show large paper profits, permitting them to pay themselves high salaries and dividends. *Blueprint* 38. "Acquisitions of insolvent S&Ls were tempting to other S&Ls trying to stave off accounting insolvency because acquirers could show fictitious income and continue to pay (indeed increase) dividends, high salaries, and so on." *Id.* at 39. There were also substantial tax benefits connected with the transactions. See *id.* at 37-38.

There are thus many reasons why entirely reasonable individuals would have taken the risks inherent in the transactions at issue in this case. At bottom, though, the terms of the contracts themselves are the best evidence of the bargains that reasonable parties in the position of respondents would have struck. See, *e.g.*, *Slater* v. *Emerson*, 60 U.S. (19 How.) 224, 238 (1857); *Maryland* v. *Railroad Co.*, 89 U.S. (22 Wall.) 105, 111-112 (1874); cf. *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819). Indeed, respondents' own arguments that it

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depreciating goodwill. Consequently, the acquirer could lock in accounting profits over the life of the acquired assets.

Blueprint 38-39.

As another commentator has noted, although goodwill was typically amortized over periods of 25 to 40 years, the thrifts' assets were overwhelmingly composed of home mortgages. "Because of prepayments (typical when a home is sold) and refinancings, the estimated life of a new 30-year fixed-rate loan is approximately seven years." Black, *supra*, 2 Stan. L. & Pol'y Rev. at 105. "If the average expected *remaining* life of the [acquired institution's] loans is five years, the annual accretion of discount is 20 percent." *Ibid.* Therefore, if goodwill and discount resulting from a merger are each $100 million,

> [i]n year one after the merger, 2.5 percent amortization of goodwill requires the S&L to recognize $2.5 million in expense. At a 20 percent annual rate for the accretion of discount, however, the boost to income in year one is $20 million. The net effect is $17.5 million in added *accounting* profits.

Ibid. "The larger the goodwill, i.e., the more the acquiring S&L overpaid for the failed S&L, the greater the reported profits." *Ibid.*

would have been "madness" to enter into the contracts at issue, Glendale Br. 31, makes it incomprehensible why respondents' able attorneys would have failed to demand that the promises they now claim to have been vital—promises that they would be permitted to count goodwill as capital for purposes of federal regulatory requirements, regardless of statutory or regulatory changes—be included in clear language in the contracts.

3. Under the unmistakability doctrine, a government contract will be construed to include a promise that the government will exercise its sovereign regulatory authority in the future in a certain way only if that promise is given in unmistakable terms. See U.S. Br. 16-22.[16] That does not mean, as respondents assert, that the contract must contain certain talismanic words, or that there must be both an initial promise that the government will exercise regulatory authority in the future in a specific way and a "second promise that Congress would not enact 'new regulatory legislation.'" Glendale Br. 26; see Winstar Br. 31-35. As noted above, there are various ways to phrase an unmistakable promise that a thrift may continue to count goodwill created in the transaction as capital, despite future changes in regulatory law or policy.

Respondents allege that the unmistakability doctrine is inapplicable in this case because the contracts at issue here involved "*commercial* transactions in which both

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[16] Winstar and Statesman appear to defend (Winstar Br. 36-38) the Federal Circuit's conclusion that the unmistakability doctrine does not apply to actions seeking monetary damages for breach of contract. We respond to that argument in our opening brief (at 20-22). Glendale no longer defends the Federal Circuit's conclusion on that point, and now relies instead on the claim that the contract in this case is a "financial" contract. See Glendale Br. 18 ("Glendale's point is not that the unmistakability principle has no application to *any* claim for breach-of-contract damages. Rather, the principle does not apply to a damages claim for the government's breach of a contract entered into *for its own financial benefit.*"). See pp. 13-14, *infra*.

parties were motivated by their own *economic* interests." Winstar Br. 39; see also Glendale Br. 18 (unmistakability principle "does not apply to a damages claim for the government's breach of a contract entered into *for its own financial benefit*"). That claim is incorrect. Application of the unmistakability doctrine has nothing to do with whether the contract at issue provides an economic benefit to the government.

As we explain in our opening brief (at 20 n.9), the unmistakability doctrine applies where the performance of the alleged promise by the government requires it to exercise—or not to exercise—uniquely governmental regulatory authority in a certain way in the future. Where, on the other hand, the performance required of the government is precisely the kind of performance that private parties typically render—such as the payment of a sum of money, see, *e.g.*, *Lynch* v. *United States*, 292 U.S. 571 (1934), or the delivery of a telegram, see, *e.g.*, *Heil* v. *United States*, 273 F. 729 (S.D.N.Y. 1921) (Hand, J.) —the doctrine has no application.

The regulatory authority relevant to this case was the authority of Congress and the Bank Board to set minimum capital requirements for federally insured thrifts and to regulate the types of assets that may count toward meeting those requirements. See 12 U.S.C. 1464(a), (b) and (s), 1725(a), 1726(b), 1730(t) (1988) (repealed). As respondents recognize, they claim "promises to accord specified *regulatory* treatment to respondents' supervisory goodwill * * *, promises that obviously could not have been made by a private party." Winstar Br. 47. That regulatory authority is not comparable to any authority that an ordinary commercial entity could unilaterally exercise in an ordinary commercial setting. Regulation of thrift industry capital levels, like other aspects of bank regulation, is a regulatory function that is essential to preserve the health and safety of the industry and, ultimately, to avoid severe damage to the national economy. See generally *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 432-433 (1986); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 327-328, 329-330 (1963); see also *United States* v. *Gaubert*, 499 U.S. 315, 332 (1991). It is exactly the sort of federal regulatory authority protected by the unmistakability doctrine.

The contractual promises that respondents allege would have committed federal officials and Congress to exercise federal regulatory authority in a particular way—*i.e.*, to permit respondents to continue to count supervisory goodwill toward satisfying federal capital requirements for periods of 25 to 40 years in the future. The contracts therefore may not be construed to surrender that regulatory authority "unless such surrender has been expressed in terms too plain to be mistaken." *Jefferson Branch Bank* v. *Skelly*, 66 U.S. (1 Black) 436, 446 (1862). See also *Bowen* v. *Public Agencies Opposed to Social Security Entrapment (POSSE)*, 477 U.S. 41, 52-53 (1986) (referring to "often-repeated admonitions that contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority"); U.S. Br. 16-18 (citing cases).

The unmistakability doctrine does not preclude the government from committing itself to future exercises of sovereign regulatory authority (assuming such authority is the sort that may be the subject of a contract in the first place, see U.S. Br. 36-43). But what respondents themselves (Winstar Br. 32) term "venerable and sensible rule of construction" does require that such commitments will not be recognized unless they are unmistakable. See U.S. Br. 16-20. Respondents were represented by counsel, who could have been expected to know that commitments regarding future exercise of federal regulatory authority cannot be the product of indirection or ambiguity.

4. Because the contracts in this case did not contain the promises that respondents claim—and because, under the unmistakability doctrine, they may not be construed

to contain those promises—this Court need not reach the question whether the thrift regulators had the authority contractually to commit the government not to exercise regulatory authority over respondents for periods of 25 to 40 years. If that issue is reached, however, the Court should conclude that the thrift regulators had no authority to enter into such contracts. See U.S. Br. 36-43.

a. Glendale argues extensively (Br. 37-39) that the "reserved powers" doctrine, which precludes state governments from entering into binding contracts regarding essential attributes of sovereignty, would not apply to the type of government contractual commitment allegedly made here. The cases that Glendale cites (Br. 37-38) concern contracts for sales of land by a government entity and contracts concerning the regulation of utility rates, rates of corporate taxation, and the method of payment of debts owed by the government. See, *e.g.*, *Wood* v. *Lovett*, 313 U.S. 362, 372 (1941) (sale of land); *Appleby* v. *City of New York*, 271 U.S. 364, 380 (1926) (same); *St. Cloud Pub. Serv. Co.* v. *City of St. Cloud*, 265 U.S. 352, 355 (1924) (utility rates); *Russell* v. *Sebastian*, 233 U.S. 195 (1914) (same); *American Smelting & Ref. Co.* v. *Colorado ex rel. Lindsley*, 204 U.S. 103, 113 (1907) (corporation franchise tax); *Lynch* v. *United States*, 292 U.S. 571 (1934) (payment of debts in gold).

We agree that the cases cited by Glendale do not involve the exercise of "reserved powers" that are never subject to contractual restriction. Indeed, the cases we ourselves rely upon have made clear that the government may—if it does so in unmistakable terms—make enforceable contractual commitments regarding allowable utility rates, see *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 211 U.S. 265, 273 (1908), or rates of taxation, see *Jefferson Branch Bank* v. *Skelly*, 66 U.S. (1 Black) at 450. Our argument is that Congress should not be deemed to have granted the authority to agency officials

to make such regulatory commitments absent an express and completely clear grant of authority to do so. As we note in our opening brief (at 39-40), this Court's decision in *Home Tel. & Tel.* makes clear that, because a contract term like the one claimed by respondents "has the effect of extinguishing *pro tanto* an undoubted power of government, *both its existence and the authority to make it* must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." 211 U.S. at 273 (emphasis added). See also, *e.g.*, *St. Cloud Public Serv. Co.* v. *City of St. Cloud*, 265 U.S. at 356; *City of Paducah* v. *Paducah Ry.*, 261 U.S. 267, 272 (1923).[17]

This does not mean, as Glendale contends (Br. 41), that "a party seeking to obtain a binding federal contract must obtain special and unprecedented legislation from Congress." Where the contract does not involve commitments regarding future government regulatory policy, the *Home Tel. & Tel.* rule has no application. Moreover, even where sovereign regulatory authority is involved,

[17] Glendale relies (Br. 38) on *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U.S. 650 (1885). There was no question of governmental authority or clarity of contractual commitment in that case. Yet this Court nonetheless made clear that the contractual grant of an exclusive franchise to a utility company was "not, in any legal sense, to the prejudice of the public health or the public safety" because the firm's activities that "prove[] to be injurious to the public health, the public comfort, or the public safety, may notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority." *Id.* at 671, 672. See also *id.* at 672 (State is not "obstruct[ed] in the exercise of her power to provide for the public protection, health, and safety"). Under the logic of respondents' theory, however, FSLIC would have had authority to exempt particular thrifts from capital requirements altogether for decades—or permanently. A contract committing the government to permit certain thrifts to operate in an unsafe manner would surely obstruct the government's "power to provide for the public protection, health, and safety."

what is necessary (assuming the authority is of the sort that can be the subject of contract) is clear authorization from Congress for the federal agency to commit the government to a particular regulatory policy for the future. As Glendale contends (Br. 40), such grants of authority are rare. Federal agencies generally are not expected to conduct regulatory policy through contractual means.[18]

Glendale attempts (Br. 42-43) to distinguish *Home Tel. & Tel.* on the ground that federal officials have inherent general authority to enter into contracts. Even if correct,[19] that contention is of no assistance to respondents. Because the thrift regulators had general statutory authority "[t]o make contracts," 12 U.S.C. 1725(c)(3) (1988) (repealed),[20] the additional existence of inherent

[18] The only example of such a contract that respondents suggest (Glendale Br. 41) is the life insurance contract at issue in *Lynch* v. *United States*, *supra*. That contract did not commit the government to exercise its regulatory authority in any particular way in the future, and its execution therefore did not require an exceptionally clear grant of authority. Moreover, as we point out in our opening brief (at 42), the agency involved had specific authority from Congress to enter into the precise kind of yearly renewable term insurance contracts that it did. In addition, the key terms, providing for the amount of the premium and the government payment in the event of death or disability, were precisely spelled out in the statute. See Act of Oct. 6, 1917, ch. 105, Art. IV, 40 Stat. 409-410.

[19] But see 41 U.S.C. 11(a) ("No contract * * * on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfilment."); 31 U.S.C. 1341(a)(1)(B).

[20] In addition to the general authority to make contracts, Glendale relies as well (Br. 40) on the former thrift regulators' authority "to guarantee" acquiring institutions "against loss by reason of [their] merging or consolidating" with "an insured institution which is in default * * * [or] in danger of default." 12 U.S.C. 1729(f)(2) (1988) (repealed). The contractual commitments respondents allege, however, did not—and did not purport to—"guarantee" respondents "against loss" because of the mergers; they would simply have committed the government to continue to permit respondents to count supervisory goodwill as capital.

authority to do the same thing is of no significance. The *Home Tel. & Tel.* rule is based on the harm that may be caused when regulatory officials enter contracts that commit the legislature to certain regulatory policies that, in the public interest, the legislature may seek to change in the future. In those circumstances, a specific delegation of legislative authority to enter into such contracts is required.

Glendale also attempts (Br. 43) to distinguish *Home Tel. & Tel.* on the ground that the City of Los Angeles, whose contract was at issue there, "had no authority at all to enter into the contract." The City of Los Angeles did, however, have very substantial general authority, such as the authority "[t]o exercise all municipal powers necessary to the complete and efficient management and control of the municipal property, and for the efficient administration of the municipal government, whether such powers be expressly enumerated [in the City's charter] or not, except such powers as are forbidden or are controlled by general law." See 211 U.S. at 275 n.1. Moreover, the city charter specifically referred to the procedural requirements for the City to "mak[e] any contract." *Ibid.* That would clearly have been sufficient to authorize the City to enter procurement contracts—for example, to contract with the phone company for telephone service to be provided to City offices. But contracts committing the City to certain substantive rate regulation policies were another matter. The Court pointedly noted that it could "find no * * * provision in the charter which by any possibility can be held to authorize a contract *upon this important and vital subject*," *id.* at 274 (emphasis added), and that what must "clearly and unmistakably appear" is "that the city had legislative authority *to make a contract of exemption from the exercise of the power of regulation*," *id.* at 277-278 (emphasis added).

As Glendale contends (Br. 43), the Court in *Home Tel. & Tel.* reaffirmed prior precedents holding that contracts regarding rate regulation were binding on the municipalities that entered into them. Referring to those cases, the Court explained that "[t]he decisions of this court * * * where a contract of this kind was found and enforced, all show *unmistakably* legislative authority to enter into the contract." 211 U.S. at 276 (emphasis added). Each of those cases thus involved, not the general authority "to enter into contracts," but very specific grants of authority to enter into precisely the contracts at issue.[21] Those cases illustrate that specific authority from the legislature is needed before city (or agency) officials commit the legislature by contract to follow certain regulatory policies. No such specific authority was present here.

5. We argue in our opening brief (at 43-46) that the "sovereign acts" doctrine derived from this Court's decision in *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925), precludes respondents' claim for breach-of-contract damages, because the alleged "breach" occurred as a result of Congress's "public and general" decision to restrict or preclude all thrifts from counting intangible

[21] The Court described the two cases cited by Glendale (Br. 43)—*City of Cleveland* v. *Cleveland City Ry. Co.*, 194 U.S. 517 (1907), and *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496 (1907)—as, respectively, involving "comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated" and "unrestricted [authority] * * * to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks." 211 U.S. at 277. See also *id.* at 276 (discussing other cases in which authority to enter into regulatory contracts was found, and which involved, respectively, a "contract [that] was in specific terms ratified and confirmed by the legislature" and a contract made "in obedience to an act of the legislature that the rates should be 'established by agreement between said company and the corporate authorities' ").

assets as capital for purposes of satisfying federal capital requirements.

a. Respondents assert (Winstar Br. 45) that "[t]he operating premise of the sovereign acts doctrine is that, where the federal government is acting in distinct capacities as sovereign and as a contractor, in its role as a contractor it is entitled to be treated as if it were a private contracting party—no better, no worse." They then state (Br. 46) that, "when a contracting party—whether a private party or a government agency—in effect assumes the risk that a change in the law will not occur, and that change does occur so as to impair contract performance, the party that assumed that risk will be liable in damages."

We have no quarrel with those statements of the law regarding the sovereign acts doctrine. See U.S. Br. 43 ("The sovereign acts doctrine is based on a principle of equality between the government and private contractors."). If the contracts at issue here had included provisions in which the government assumed the risk of a change in the governing statutes, the sovereign acts doctrine would not preclude a breach-of-contract remedy when those statutes were amended to render performance impossible. See, *e.g.*, *Amino Brothers Co.* v. *United States*, 372 F.2d 485, 491 (Ct. Cl.) ("The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act."), cert. denied, 389 U.S. 846 (1967). As the original court of appeals panel in this case noted, however, "[a] private party does not necessarily promise that Congress will act only for the benefit of his promisee's interests under the contract." Pet. App. 75a. Under the principle of equality upon which the sovereign acts doctrine rests, the same is true when a federal agency acts in its role as contracting party: the

agency as contractor does not automatically assume the risk that Congress will change the law.

We do disagree with respondents' contention (Winstar Br. 47) that, in the contracts at issue in this case, the government agreed to "assume [the] risk that future regulatory changes would not interfere with the promised regulatory treatment of supervisory goodwill and capital credits." There is no provision in respondents' contracts in which the thrift regulators assumed the risk of a subsequent statutory change like FIRREA. See U.S. Br. 28 ("no unlawful action" clause shifted risk of legal change to respondents). If respondents' theory that the FSLIC contracts implicitly assumed the risk of a subsequent sovereign act of another agency were correct, it would swallow up the sovereign acts doctrine entirely. Under respondents' theory, for example, the contract in *Horowitz* for delivery of silk that one executive agency signed would implicitly assume the risk that in fact occurred—that another agency would impose a railroad embargo making the government's performance impossible. In this case, moreover, the contracting agency—the FSLIC—was in a different branch of the government from Congress, whose passage of FIRREA made performance impossible. See *Atlas Corp.* v. *United States*, 895 F.2d 745, 754 (Fed. Cir.) (holding sovereign acts doctrine applicable where increased cost of contract was the result of statute, despite fact that agency had agreed to adjust price in the event of "unilateral modification [of specifications] by government"), cert. denied, 498 U.S. 811 (1990). None of the Claims Court or Federal Circuit cases cited by respondents, see Winstar Br. 44-45; Glendale Br. 50, involved a similar situation.

b. Respondents argue (Glendale Br. 44-46; Winstar Br. 46) that the sovereign acts doctrine is inconsistent with this Court's decisions in *Lynch* and *Perry* v. *United States*, 294 U.S. 330 (1935). As the Court noted in *POSSE*, however, those cases "held that Congress does not have the power to repudiate its own debts, which constitute

'property' to the lender, simply in order to save money." 477 U.S. at 55. They do not support respondents' argument.

In *Lynch*, the government's repudiation of its war risk insurance contracts was not part of any general program of regulation of the insurance industry, and the *only* individuals affected by the repudiation were those who had contracts with the government. Thus, unlike in *Horowitz*, the government program was not "public and general," and the sovereign acts doctrine could have no application. Indeed, the Court in *Lynch* carefully noted that the insurance policies could not be annulled "unless, indeed, the action taken falls within the federal police power or some other paramount power," 292 U.S. at 579, thereby implicitly distinguishing between mere repudiation of a money debt (as in *Lynch*) and public and general sovereign acts undertaken for the public welfare (as in *Horowitz* and this case).

With respect to *Perry*, respondents rely (Glendale Br. 44; Winstar Br. 46) on the fact that Congress's decision to repudiate the commitments in certain government bonds that they would be repaid in gold was made at the same time as a broader determination that private debts of all kinds may not be paid in gold. Respondents argue from that fact that the attempt unilaterally to alter the terms of the public debt in *Perry* was part of a "public and general" act. However, the regulatory purposes underlying the regulation of private debts—primarily, the need to control the value of money in the economy and set it at a rate higher than would have been permitted by tying it to the value of then-scarce gold, see *Norman* v. *Baltimore & O.R.R.*, 294 U.S. 240, 312-313, 315-316 (1935)—could be accomplished without applying the same measure to alter the terms of existing government debt. Indeed, the purpose of promising repayment of government bonds in gold initially was "to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium

of payment." *Perry*, 294 U.S. at 348-349.[22] To repudiate that promise was "simply in order to save money," *POSSE*, 477 U.S. at 55—an end that has never been recognized as "public and general" under the sovereign acts doctrine.[23]

c. Finally, Glendale argues (Br. 47) that to apply the sovereign acts doctrine in this case would be "to give [FIRREA] a retroactive effect." That contention is incorrect. FIRREA did not impose legal consequences on respondents based on the fact that, at some point in the past, they had counted supervisory goodwill as capital. FIRREA required thrifts to be adequately capitalized in the future. That is the ordinary, prospective operation of a statute, and it raises no retroactivity issues at all.

Moreover, if Glendale's argument were correct, then any recognition of a statute as a "public and general" act that may excuse a breach of contract would be contrary to retroactivity principles, since any such recognition would "retroactively" eliminate a cause of action for breach of contract.[24] In the 130-year history of the

[22] The Court in *Perry* also emphasized that the government bonds in that case were issued under the express constitutional authority "[t]o borrow Money on the credit of the United States," Art. I, § 8, Cl. 2, and supported by the declaration in Section 4 of the Fourteenth Amendment that "[t]he validity of the public debt of the United States, authorized by law, * * * shall not be questioned." See 294 U.S. at 353-354. In light of those provisions, the Court held that the statute, "in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power." *Id.* at 354. In this case, there is no doubt that Congress had the authority to alter government policy regarding capital requirements for thrifts.

[23] It should also be noted that the Court determined that the plaintiff in *Perry* had "fail[ed] to show a cause of action for actual damages," see 294 U.S. at 358, in light of Congress's valid action in forbidding the use of gold as legal tender, see generally *id.* at 357-358.

[24] Glendale relies (Br. 45 n.33) on the principle that "a private party cannot claim impossibility based on a supervening law or

sovereign acts doctrine, since the Court of Claims first recognized that a statute could be a sovereign act for purposes of the doctrine, see *Deming* v. *United States*, 1 Ct. Cl. 190, 191 (1865), appeal dismissed, 76 U.S. (9 Wall.) 145 (1870), no court has ever held that statutes may not constitute "public and general" acts that can trigger the doctrine.

* * * * *

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1996

decree when its 'own actions created the condition of impossibility.' " However, *all* applications of the sovereign acts doctrine involve cases in which the government—by enacting a statute or taking some other sovereign act—has "created the condition of impossibility" for its own performance. As this Court stated in *Horowitz*, the rationale of the doctrine is precisely that, in such a case, "[t]he two characters which the government possesses as a contractor and as a sovereign cannot be thus fused," 267 U.S. at 461, so long as the sovereign act that has created the impossibility is a "public and general" one.

APPENDIX A

IN THE UNITED STATES CLAIMS COURT

Action No. 90-772 C
(Chief Judge Loren Smith)

GLENDALE FEDERAL BANK, FSB, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DECLARATION OF PATRICIA LEITNER PURSUANT TO CL. CT. R. 56(G) IN OPPOSITION TO PLAINTIFF GLENDALE'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

I, Patricia Leitner, make the following declaration:

1. I am an attorney employed by the Department of Justice and am counsel of record for the United States in the above-captioned case. I am familiar with the facts and circumstances of this action, and make this declaration pursuant to Rule 56(g) of the Rules of the United States Claims Court in opposition to plaintiffs' motion for summary judgment.

2. The United States has argued in Defendant's Motion to Dismiss that the United States is entitled to dismissal of plaintiff's claims, and in its Response to Plaintiff's Status Report and Opposition to Plaintiff Glendale's Motion for Summary Judgment as to Liability, the United States has argued that summary judgment should not be entered in plaintiff's favor. The issues presented may be resolved without resolution of factual issues. For this

reason, defendant's view has been that discovery is unnecessary and inappropriate in this action. If this Court determines, however, based upon all of the pleadings and papers presently before it, that no material issues of fact exist at this time, and that, on the current record, plaintiff is entitled to summary judgment as to any claim or claims, defendant respectfully submits that a ruling on plaintiff's motion would be premature, as defendant has not had an opportunity to obtain discovery as to certain issues raised in plaintiff's motion for summary judgment.

3. Plaintiff alleges, relying upon documents outside its alleged contracts with the FSLIC, that the alleged contracts include provisions that do not appear on their face and that plaintiff understood and relied upon representations allegedly made respecting goodwill that do not appear on the face of those contracts.

4. Defendant has argued that plaintiff has no such contractual rights and that, in any event, plaintiff has no contractual right that can bind the government from taking any action required by law. Should the Court deem plaintiff's claim cognizable, however, defendant will need discovery to obtain facts to determine what plaintiff understood it had been promised, the basis for this understanding, and what reliance plaintiff placed on any alleged promises it received.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 15, 1992

/s/ Patricia Leitner
PATRICIA LEITNER

APPENDIX B

Rule 56 of the Court of Federal Claims Rules provides as follows:

Rule 56. Summary Judgment

(a) For claimant

A party seeking to recover upon a claim or counterclaim, or to obtain a declaratory judgment may, at any time after the expiration of 60 days from the commencement of the action in this court or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in such party's favor upon all or any part thereof.

(b) For defending party

A party against whom a claim or counterclaim is asserted or a declaratory judgment it sought may, at any time, move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof.

(c) Motion and proceedings thereon

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Procedures

The following procedures shall be followed with respect to motions for summary judgment other than in actions seeking review of a decision on the basis of an administrative record:

(1) The moving or cross-moving party shall file, together with its motion, a separate document entitled Proposed Findings of Uncontroverted Fact. This document shall contain concise, separately numbered paragraphs setting forth all of the material facts upon which the party bases its motion and as to which the party believes there is no genuine dispute. Each paragraph shall contain citations to the opposing party's pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record in the case.

(2) The opposing party shall file, together with its opposition or cross-motion, a separate document entitled Statement of Genuine Issues. This document shall respond by reference to specific paragraph numbers to those proposed findings of uncontroverted fact as to which it claims there is a genuine dispute. The party shall state the precise nature of its disagreement and give its version of the events, supported by record citations. The opposing party may also file proposed findings of uncontroverted fact as to any relevant matters not covered by the moving party's statement.

(3) The parties may dispense with the documents called for in subdivision (d)(1)-(2) of this rule if they file, no later than the time of the initial motion, a comprehensive stipulation of all of the material facts upon which they intend to rely.

In determining any motion for summary judgment, the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported

by the moving party to be established, except to the extent that such material facts are included in the Statement of Genuine Issues and are controverted by affidavit or other written or oral evidence.

(e) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(f) Form of affidavits; further testimony; defense required

See Appendix H ¶ 1. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of such party's pleading, but such party's response, by affidavits

or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If such party does not so respond, summary judgment, if appropriate, shall be entered against such party.

(g) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify such party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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